Supreme Court, U. S.
FILED
JUL 29 1974
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-1995

ALLEN F. BREED,

Petitioner,

v.

GARY STEVEN JONES,

Respondent.

APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

TO: THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Gary Steven Jones, respondent herein, respectfully applies for permission to proceed in forma pauperis in connection with the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit previously filed by petitioner. Respondent's affidavit in support thereof is annexed hereto.

Dated: San Francisco, California
July 16, 1974

Respectfully submitted,

ROBERT L. WALKER
Youth Law Center
795 Turk Street
San Francisco, CA 94102
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By Robert L. Walker

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ALLEN F. BREED,
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Respondent.

No.

AFFIDAVIT OF GARY STEVEN JONES IN SUPPORT OF APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I, GARY STENVE JONES, being first duly sworn according to law, depose and say in support of my application for leave to proceed without prepayment of costs or fees, as follows:

1. I am the respondent in the above-entitled case;

2. I am 21 years of age;

3. I am presently unemployed;

4. Because of my poverty I am unable to pay the fees and costs of said cause;

5. Similarly, because of my poverty, I am unable to give security for the same, or to pay for the cost of printing any briefs;

6. I have no present income and am on parole from the California Youth Authority;

7. In the proceedings below before the United States District Court for the Central District of California and the United States Court of Appeals for the Ninth Circuit, the aforementioned Courts permitted me to proceed in forma pauperis;

8. The nature of the cause is fully described in petitioner's petition for writ of certiorari previously filed with this Court;

9. I believe my case is meritorious and this application is not made for the purpose of delay;

10. My attorney, Robert L. Walker of the Youth Law Center, is serving without payment of any fees.

SUBSCRIBED AND SWORN TO
before me this 18th day of
July, 1974.

Notary Public

OFFICIAL SEAL
PETER B. SANDMANN
NOTARY PUBLIC-CALIFORNIA
SAN FRANCISCO COUNTY
My Commission Expires Sept. 23, 1975
795 Turk St., San Francisco, CA. 91102

/ Gary Steven Jones
Gary Steven Jones

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ALLEN F. BREED,
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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Attorney for Respondent

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Petitioner,
v.
GARY STEVEN JONES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is not yet reported; it is annexed to the Petition for Writ of Certiorari [hereinafter "Petition"] as Appendix "A". The opinion of the United States District Court for the Central District of California is reported as Jones v. Breed, 343 F. Supp. 690 (C.D. Cal. 1972). The opinion of the California Court of Appeal, Second Appellate District, dismissing respondent's petition for a writ of habeas corpus, is reported as In re Gary Steven J., 17 C.A.3d 704, 95 Cal. Rptr. 185 (1971). The latter two opinions are annexed to the petition as Appendices "B" and "C", respectively.

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JURISDICTION

The jurisdictional prerequisites are adequately set forth at page two of the petition.

QUESTION PRESENTED

Whether respondent was twice placed in jeopardy, in violation of his rights under the Fifth Amendment to the United States Constitution, when he was tried in adult court in connection with the same offense for which he had previously been tried and adjudicated a delinquent by the juvenile court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the California Welfare and Institutions Code [hereafter "W&I"] are set forth at pp. 3-6 of the petition. The Fifth and Fourteenth Amendments to the United States Constitution are reproduced as Appendix "A", infra.

STATEMENT OF THE CASE

The pertinent facts, as well as the proceedings below, are adequately summarized in the opinion of the United States Court of Appeals for the Ninth Circuit.

ARGUMENT

This case presents a narrow issue. Respondent, Gary Steven Jones, was found by the juvenile court to be unamenable to the "care, treatment and training program available through . . . [its] facilities . . ." W&I §707. This determination was made after respondent had been subjected to a full trial in juvenile court on a charge of armed robbery and had been adjudicated a delinquent. Subsequently, respondent was remanded to adult court; he was there tried and convicted of the same armed robbery which had formed the basis for the juvenile court's prior adjudication.

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The Ninth Circuit's holding that this procedure contravened the double jeopardy prohibition of the Fifth Amendment is fully in accord with the decisions of this Court that a person may not be tried twice for the same offense.[1/] The Ninth Circuit's decision will not impede the juvenile court in any way. The sole effect of the decision is to require that the fitness decision be reached before the adjudicatory hearing in juvenile court. The California Supreme Court has stated in this regard:

> The usual practice as to a fitness hearing in many juvenile courts in this state is that followed in the case before us. A hearing on the issue is noticed and held before the jurisdictional hearing. This practice of deciding the issue of fitness at the very outset is recommended in the California Juvenile Court Benchbook (Cal. College of Trial Judges (1971) §1014, pp. 190-191) and we commend it. Donald L. v. Superior Court, 7 Cal.3d 592, 598, 102 Cal. Rptr. 850, 853 (1972).

The Ninth Circuit's opinion does no more that harmonize the requirements of the federal Constitution with the usual and preferred practice in California. Even if this Court determined to grant certiorari and reverse the Ninth Circuit's decision, such a ruling would have no practical effect upon the present practice in the juvenile courts in California.

I

THERE IS NO CONFLICT BETWEEN DECISIONS OF THE CIRCUIT COURTS OF APPEALS

There is only one other Court of Appeals which has squarely faced the issue which the Ninth Circuit resolved in respondent's favor. In Fain v. Duff, 488 F.2d 218 (5th Cir. 1973), the Fifth Circuit ruled that the Florida procedure by which a minor

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1/ See, e.g., Waller v. Florida, 397 U.S. 387 (1970); Downum v. United States, 372 U.S. 734 (1963); Green v. United States, 355 U.S. 184, 187 (1957); Helvering v. Mitchell, 303 U.S. 391, 398 (1938); Kepner v. United States, 195 U.S. 100, 130 (1904); Ex parte Lange, 18 Wall 163, 169, 21 L. Ed. 872 (1873).

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was tried as a criminal after having been adjudged delinquent by a juvenile court violated the former jeopardy provision of the Fifth Amendment.

Petitioner attempts to argue that the decision of the United States Court of Appeals for the District of Columbia Circuit in United States v. Dickerson, 271 F.2d 487 (D.C. Cir. 1959), is in conflict with the opinions of the Fifth and Ninth Circuits. This is not true. In Dickerson the Court found that jeopardy had not attached during the juvenile proceedings because the minor's admission of guilt occurred at a preliminary hearing; was not a guilty plea; and was never accepted by the Court as a guilty plea. 271 F.2d at 491. Since the Court found that jeopardy had never attached during the proceedings in juvenile court, it never squarely confronted the issue of whether the minor had been twice placed in jeopardy.[2/]

The differing results in Dickerson, on the one hand, and Jones and Fain, on the other hand, are attributable to differences in their facts and in the manner in which the Courts construed the records. Such differences do not rise to the level of conflicting opinions among the Courts of Appeal as to underlying issues of double jeopardy law.

II

PETITIONER GREATLY EXAGGERATES THE EFFECTS OF THE NINTH CIRCUIT'S DECISION

Petitioner suggests that there are a large number of

2/ As the Ninth Circuit noted below, the Dickerson decision was pre-Kent, Gault and Winship. It is also important to note that Dickerson was decided prior to this Court's decision in Benton v. Maryland, 395 U.S. 784 (1969), holding that the double jeopardy protection is applicable to criminal proceedings in state courts. These latter cases vitiate the dicta in Dickerson that the double jeopardy clause does not apply to juvenile court proceedings.

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persons presently in California prisons who will be released if the Ninth Circuit's decision is permitted to stand. In support of this contention he cites statistics from the years 1969-1971 showing the number of persons under the age of twenty-one committed to California prisons.[3] There figures are highly misleading.

Effective March 4, 1972, the California Legislature passed the so-called Priolo Act, Cal. Stats 1971, chs. 1729, 1748, lowering the age of juvenile court jurisdiction to eighteen. Prior to that date juvenile and adult courts retained concurrent jurisdiction over persons between the ages of eighteen and twenty-one. However, the overwhelming practice throughout California was for persons over the age of eighteen to be arraigned and tried initially as adults. In a small percentage of the cases, the adult courts would remand the cases to juvenile courts under the power then vested in them by W&I §604.

Therefore, the vast majority of the 1035 eighteen to twenty-one year olds cited by petitioner never had petitions filed against them in juvenile court. They were initially tried as adults and were sentenced to state prison by the adult court. As for the remaining, extremely small number, who were remanded to adult court by the juvenile courts, the statistics do not reveal whether for these minors the fitness [W&I §707] hearings were conducted prior to the jurisdictional [W&I §701] hearings in juvenile court. If such hearings were conducted prior to the adjudicatory stage of these proceedings,[4] jeopardy never attached; and these persons would similarly be unaffected by the Jones v. Breed decision. Therefore, the figures cited by petitioner are not helpful in speculating as to the impact of the decision below.

3/ Petition, p. 10.

4/ Cal. W&I Code §707 does not require the fitness hearing to be held at any particular stage of the juvenile court proceedings.

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In addition, petitioner assumes that the Court's decision will be applied retroactively under Ashe v. Swensen, 397 U.S. 436, 438, n. 1 (1970). The issue of retroactivity was not discussed in the Jones opinion and, at this juncture, must be considered open. Petitioner's fears about the floodgates opening would be better left to a time when the courts have determined whether Jones will be applied retroactively, and when meaningful statistical data is available.

III

THE DECISION BELOW IS COMPATIBLE WITH THE PRACTICES AND PHILOSOPHY OF THE JUVENILE COURT

Petitioner notes that the Ninth Circuit decision is in conflict with various opinions of the California state courts.[5] He suggests elsewhere that the procedure required by the decision in this case is inconsistent with the philosophy of the juvenile court and will be difficult to implement.[6]

As noted previously, the California Supreme Court has explicitly commended the practice of determining the issue of fitness at the very outset of the juvenile court proceedings. Donald L. v. Superior Court, 7 Cal. 3d 592, 598, 102 Cal. Rptr. 850, 853 (1972). The court stated that this is the practice which is recommended in the California Juvenile Court Benchbook, a volumn which is used by most, if not all, of the juvenile court judges in California.

Respondent submits that this determination by the California Supreme Court as to the consistency between the result required by the decision below and California juvenile court law is binding upon this Court. It is true that a conflict in constitu-

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5/ Petition, pp. 20-1.

6/ Petition, pp. 12-16.

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tional law does exist. This conflict, however, is of negligible practical significance since it must be assumed that California juvenile court judges will adhere to the procedure recommended by the highest court of the state.

IV

THE PROCEDURE REQUIRED BY THE NINTH CIRCUIT's DECISION IS CLEARLY PREFERRED BY JUVENILE COURT SCHOLARS AND EXPERTS

The practice which is in harmony with the double jeopardy clause is also considered the most desirable by all juvenile court experts.[7/] Petitioner refers to a number of jurisdictions where, apparently, state statutes do not require fitness hearings to be held prior to the commencement of the jurisdictional hearing.[8/] Petitioner does not inform the Court as to what the actual practice is in these jurisdictions. As respondent has already noted, California is one jurisdiction where the practice -- although not required by statute -- is congruent with the requirements imposed by the double jeopardy clause.

There are thriteen jurisdictions which by statute require fitness hearings to be conducted prior to the commencement of the jurisdictional hearing.[9/] Many of these statutes have been

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7/ See, Antieau, Constitutional Rights in Juvenile Courts, 46 Cornell L.Q. 387, 397-98 (1961); Juvenile Court Deskbook, §10.4, supra; National Council on Crime and Delinquency, Model Rules for Juvenile Courts, Rule 9 (1968); U.S. Department of Health, Education and Welfare, Social and Rehabilitative Services, Children's Bureau, Legislative Guide for Drafting Family and Juvenile Court Acts, Sec. 27 (1969); American Bar Association National Institute, Uniform Juvenile Court Act, Sec. 34 (final draft, 1969); Note, Double Jeopardy and the Waiver of Jurisdiction in California's Juvenile Courts, 24 Stan L. Rev. 874 (1972).

8/ Petition, p. 9.

9/ Dist. of Col. Code §16-2307(a)(d); Ohio Code Supp. §2151.26 (A); Colorado Rev. Stats §22-3-6(4)(a)(b)(c); Ga. Code Ann. §24A-2501 (1971); Ill. Rev. Stats, ch. 37 §702-713 (Supp. 1972); Minnesota Probate Juvenile Courts, Rules of Procedure, Rule 8-1(2); N.C. Gen. Stats §7A-280; N.H. Rev. Stats Ann. §169.21; N.D. Century Code §27-20-34; N.M. Stat. Ann. §13-14-27 (Supp. 1972); Maryland Code Ann., Art 26 §70-16; Tenn. Code Ann. §37.234(a); Wyoming Stats 1971 Cum. Suppl. §14.115.38.

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enacted as a result of recent redrafting of juvenile court laws. The practice sanctioned by the California Supreme Court, and required by the Ninth Circuit, is clearly consistent with the thinking of modern juvenile court experts and state legislatures.

CONCLUSION

For the foregoing reasons respondent respectfully submits that the Petition for a Writ of Certiorari be denied.

Dated: July 11, 1974

Respectfully submitted,

By Robert L. Walker
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Attorney for Respondent

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